

**No. 10-16772**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**FAUZIA DIN,**

**Plaintiff-Appellant,**

**v.**

**JOHN F. KERRY, United States Secretary of State, *et al.*,**

**Defendants-Appellees.**

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**ON APPEAL FROM A FINAL ORDER OF THE UNITED STATES  
DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

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**PETITION FOR REHEARING EN BANC**

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## **TABLE OF CONTENTS**

INTRODUCTION .....	1
BACKGROUND .....	2
ARGUMENT .....	6
CONCLUSION .....	14
CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1	
CERTIFICATE OF SERVICE	

## **TABLE OF AUTHORITIES**

### **CASES**

<i>Bangura v. Hansen</i> , 434 F.3d 487, 495-96 (6th Cir. 2006).....	8
<i>Burrafato v. U.S. Dep’t of State</i> , 523 F.2d 554 (2d Cir. 1975) .....	8
<i>Bustamente v. Mukasey</i> , 531 F.3d 1059 (9th Cir. 2008) .....	4, 5, 6, 8
<i>Cervantes v. INS</i> , 510 F.2d 89, 91-21 (10th Cir. 1975).....	7
<i>Department of Navy v. Egan</i> , 484 U.S. 518 (1988).....	10
<i>Din v. Kerry</i> , 718 F.3d 856 (9th Cir. 2013) .....	5, passim
<i>Galvan v. Press</i> , 374 U.S. 522 (1954).....	10
<i>Garcia v. Boldin</i> , 691 F.2d 1172 (5th Cir. 1982) .....	8
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1971).....	2, 3, 4
<i>Li Hing of Hong Kong v. Levin</i> , 800 F.2d 970 (9th Cir. 1986) .....	3
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	12

<i>Mendez v. Major</i> , 340 F.2d 128, 131-32 (8th Cir. 1965).....	7
<i>Oforji v. Ashcroft</i> , 354 F.3d 609 (7th Cir. 2003) .....	7
<i>Reno v. Flores</i> , 507 U.S. 292 (1992).....	7, 8
<i>Rubio de Cachu v. INS</i> , 568 F.2d 625 (9th Cir. 1977) .....	7
<i>Shaughnessy v. United States ex rel. Mezei</i> , 345 U.S. 206 (1953).....	2, 10
<i>Silverman v. Rogers</i> , 437 F.2d 102 (1st Cir. 1970).....	8
<i>Swartz v. Rogers</i> , 254 F.2d 338 (D.C. Cir. 1958).....	8
<i>United States ex rel. Knauff v. Shaughnessy</i> , 338 U.S. 537 (1950).....	2
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997).....	7, 9
<i>Zadvydas v. Davis</i> , 533 U.S. 678 (2001).....	10, 13

## **STATUTES**

8 U.S.C. § 1104(a)(1).....	3
8 U.S.C. § 1182(a) .....	2
8 U.S.C. § 1182(a)(3).....	2

8 U.S.C. § 1182(a)(3)(B) .....	2, 5, 11, 12
8 U.S.C. § 1182(b)(1).....	11
8 U.S.C. § 1182(b)(3).....	11, 12
8 U.S.C. § 1201(a)(1).....	3
8 U.S.C. § 1201(g)(3).....	3
8 U.S.C. § 1201(i) .....	3

## **REGULATIONS**

22 C.F.R. § 40.6 .....	3
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## INTRODUCTION

The Government petitions for *en banc* rehearing. Under the doctrine of consular nonreviewability, a consular officer's decision to deny a visa to an alien is not subject to judicial review. The panel majority's decision conflicts with precedent of the Supreme Court, this Court, and other courts of appeal by creating an exception to that doctrine based on the allegation of a United States citizen who is married to an alien, that a visa denial impaired her constitutionally-protected interest in marriage. But the consular officer's visa decision had no cognizable effect on that interest.

This case also presents issues of exceptional importance. The panel majority recognized that, even when review of a visa denial is appropriate, it is limited to determining whether the government has identified a "facially legitimate and bona fide" reason for the decision. The panel majority held, however, that the government's identification of a statutory ground for exclusion for terrorism-related activity did not qualify as a "facially legitimate" reason, notwithstanding Congress's express provision that the government need not disclose *any* information regarding the basis for a visa denied on terrorism-related grounds.

The panel majority's holdings constitute a significant violation of the separation of powers by encroaching on decisions entrusted solely to the political branches. The panel majority's decision also undermines the political branches' ability to protect sensitive national security information while excluding from

admission aliens connected with terrorist activity. *En banc* review is urgently required.

## **BACKGROUND**

1. It is well settled that Congress has “plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.” *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1971) (citation omitted); *see ibid.* (“[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens.”) (alteration in original; internal quotation marks and citation omitted). Accordingly, an “unadmitted and nonresident alien” has “no constitutional right of entry to this country as a nonimmigrant or otherwise.” *Id.* at 762. Thus, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.” *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950). “And because the action of the executive officer under such authority is final and conclusive, the [Executive Branch] cannot be compelled to disclose the evidence underlying [its] determinations in an exclusion case.” *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Congress has identified “[c]lasses of aliens ineligible for visas or admission” to the United States. 8 U.S.C. § 1182(a). Among those is a class of aliens excludable for “[s]ecurity and related grounds,” including various specified “[t]errorist activities.” 8 U.S.C. § 1182(a)(3) and (3)(B). Congress has authorized

“consular officer[s]” to determine an alien’s eligibility for a visa. 8 U.S.C.

§ 1201(a)(1). A consular officer may deny a visa if he or she “has reason to believe” that the alien falls within a class of aliens ineligible for admission. 8 U.S.C. § 1201(g)(3); *see* 22 C.F.R. § 40.6 (defining “reason to believe”).

Congress has not provided for administrative review of a consular officer’s decision to deny a visa application. 8 U.S.C. § 1104(a)(1) (excluding from the Secretary of State’s authority to administer and enforce the INA the power to review the duties and functions conferred on consular officers, including the administration and enforcement of laws relating to the grant or refusal of visas). Congress also has not provided for judicial review of visa denials, except in a limited situation (*see* 8 U.S.C. § 1201(i), relative to removal proceedings). In light of Congress’s plenary authority over visas, courts generally have taken the absence of an express provision for judicial review of visa decisions to mean that courts lack authority to adjudicate a claim that a consular officer improperly denied a visa application. *See, e.g., Li Hing of Hong Kong v. Levin*, 800 F.2d 970, 970 (9th Cir. 1986) (“The doctrine of nonreviewability of a consul’s decision to grant or deny a visa stems from the Supreme Court’s confirming that the legislative power of Congress over the admission of aliens is virtually complete.”).

Many courts have, however, recognized a limited exception to the doctrine of consular nonreviewability if a consular officer’s denial of a visa implicates a constitutional right of a United States citizen, almost always in the First



Amendment context. In *Mandel*, the Supreme Court considered the claim that the Attorney General’s denial of a waiver of inadmissibility impaired the First Amendment rights of United States citizens who wished to hear the excluded alien speak. 408 U.S. at 754. The Court held that when a government officer declines to grant a waiver of inadmissibility “on the basis of a facially legitimate and bona fide reason, the courts will neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant.” *Id.* at 770. Relying on *Mandel* (which did not involve any action by a consular officer), courts of appeal, including this Court, have permitted United States citizens to seek judicial review of the denial of visa applications that purportedly implicate the citizens’ constitutional rights and have required the United States to articulate a “facially legitimate and bona fide reason” for the denial. *See, e.g., Bustamante v. Mukasey*, 531 F.3d 1059 (9th Cir. 2008).

2. Plaintiff Fauzia Din is a United States citizen who, in 2006, married Kanishka Berashk, an Afghan citizen who resides in Afghanistan. Except of Record (“ER”) at 5, ¶ 26. Berashk has worked for the Afghan Ministry of Social Welfare since 1992, including during the period when the Taliban controlled the country. ER at 4, ¶¶ 22, 23. Shortly after Din and Berashk were married, Din filed an immigrant visa petition for Berashk. ER at 5. The United States Citizenship and Immigration Services notified Din that it approved the petition. *Ibid.* But after

Berashk's interview at the United States Embassy in Islamabad, a consular officer denied Berashk's visa application, citing 8 U.S.C. § 1182(a)(3)(B), a provision making an alien inadmissible on terrorism-related grounds. *Id.* at 4, 6, 10.

Din brought suit, seeking review of the visa denial and alleging that the government's action impaired her constitutionally protected interest in her marriage to Berashk. ER at 10. The district court granted the government's motion to dismiss, holding that the government's identification of 8 U.S.C. § 1182(a)(3)(B) was a "facially legitimate" reason for the denial and that Din had not established that the reason was not "bona fide." *Id.* at 46-53, 55.

The panel majority reversed. *Din v. Kerry*, 718 F.3d 856 (9th Cir. 2013). The Court determined that it had authority to review the consular officer's visa denial because, in a prior decision, the Court "recognized that a citizen has a protected liberty interest in marriage that entitles the citizen to review of a spouse's visa." *Id.* at 860; *see Bustamante*, 531 F.3d at 1062. The Court held that the government's identification of a "properly construed" statutory ground for exclusion combined with a consular officer's assurance that he or she had reason to believe that the ground applies to the visa applicant would be a facially legitimate reason for the denial. *Din*, 718 F.3d at 861. But the Court held that the government failed to satisfy that standard in this case because it cited only the general terrorism exclusion provision and failed to make any specific allegation

that Berashk had engaged in behavior coming within a specific provision. *Id.* at 863.<sup>1</sup>

Judge Clifton dissented. *Din*, 718 F.3d at 868-73. He would have held that the government’s identification of the terrorism exclusion provision was a facially legitimate reason for denying Berashk’s visa and that, in the absence of any allegation of bad faith, the reason was bona fide. *Id.* at 869-71. In Judge Clifton’s view, requiring the government to identify more specifically the statutory ground for the visa denial and to provide factual allegations disregards Congress’s determination that in cases involving denial of visas on terrorism-related grounds, the government need not disclose that information. *Id.* at 871.

## **ARGUMENT**

1. *En banc* review is merited because the panel majority’s threshold decision to except this case from the doctrine of consular nonreviewability conflicts with precedent from within and without the Ninth Circuit and improperly encroaches on Congress’s plenary authority over the admission of aliens.

The panel majority recognized that the doctrine of consular nonreviewability is the general rule in cases challenging visa denials. *Din*, 718 F.3d at 860.

However, this Court in *Bustamante* held that “[f]reedom of personal choice in matters of marriage and family life is . . . one of the liberties protected by the Due

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<sup>1</sup> Because it concluded that the government failed to establish that the visa denial was based on a “facially legitimate” reason, the panel majority did not consider whether the government’s reasons were “bona fide.” *Din*, 718 F.3d at 867.

Process Clause.” 531 F.3d at 1062. In this case, because Din is married to Berashk, the panel majority held, the denial of Berashk’s visa implicates Din’s constitutionally-protected liberty interest and so permits limited judicial review of the consular officer’s visa denial. *Din*, 718 F.3d at 860.

That conclusion, however, is in sharp tension with other precedent both inside and outside this Circuit. In *Reno v. Flores*, the Supreme Court explained that, for a “right” to be protected by the Due Process Clause, it must be “so rooted in the traditions and conscience of our people as to be ranked fundamental.” 507 U.S. 292, 303 (1992) (citation omitted). In addition, before recognizing a right to be “fundamental,” the Supreme Court has “required . . . a ‘careful description’ of the asserted fundamental interest” and has refused to recognize as fundamental formulations of a right at a high level of generality. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997); *see id.* at 722. Consistent with that precedent, this Court has held that a United States citizen does not have a constitutionally-protected interest in the presence of an alien relative in the United States. *See, e.g., Rubio de Cachu v. INS*, 568 F.2d 625, 627 (9th Cir. 1977) (holding that an alien’s deportation does not violate the constitutional rights of the alien’s children, who were United States citizens). Other circuits have come to the same conclusion. *See, e.g., Oforji v. Ashcroft*, 354 F.3d 609, 618 (7th Cir. 2003); *Cervantes v. INS*, 510 F.2d 89, 91-21 (10th Cir. 1975); *Mendez v. Major*, 340 F.2d 128, 131-32 (8th Cir. 1965). More directly on point, other courts of appeal have held that a United

States citizen has no constitutional right to have an alien spouse reside with him or her in the United States. *See, e.g., Bangura v. Hansen*, 434 F.3d 487, 495-96 (6th Cir. 2006); *Garcia v. Boldin*, 691 F.2d 1172, 1183 (5th Cir. 1982); *Burrafato v. U.S. Dep't of State*, 523 F.2d 554, 555 (2d Cir. 1975); *Silverman v. Rogers*, 437 F.2d 102, 107 (1st Cir. 1970); *Swartz v. Rogers*, 254 F.2d 338, 339 (D.C. Cir. 1958); *see also Flores*, 507 U.S. at 303 (“The mere novelty of such a claim is reason enough to doubt that ‘substantive due process’ sustains it.”).

The panel majority acknowledged the government’s argument that *Bustamante* is inconsistent with circuit precedent insofar as it recognizes a citizen’s liberty interest to live in the United States with an alien spouse. *Din*, 718 F.3d at 860, n.1. The panel majority believed, however, that *Bustamante* relied on a more general right to freedom of choice in matters of marriage. *Ibid.* But the visa denial in this case in no way interfered with Din’s decision to marry Berashk; that marriage occurred before Berashk had even applied for the visa. Nor does the visa decision nullify the marriage or deprive Din and Berashk the legal benefits of marriage, or prevent them from living together anywhere other than in the United States. *Cf. Swartz*, 254 F.2d at 339 (“Certainly deportation would put burdens upon the marriage. It would impose upon the wife the choice of living abroad with her husband or living in this country without him. But deportation would not in any way destroy the legal union which the marriage created.”). Thus, the panel majority erred in concluding that the visa denial implicated Din’s liberty interest in

the freedom of choice in marriage. More fundamentally, Din’s general liberty interest in marriage cannot properly be the basis for judicial review of Berashk’s visa denial when the more specific interest – a United States citizen’s interest in having an alien spouse join her in the United States – is not. *See Glucksberg*, 521 U.S. at 721-22.

The panel majority’s threshold decision to engage in judicial review of a consular officer’s visa determination is thus premised on an incorrect determination that the decision implicated Din’s constitutionally protected-interest, whether that interest is in the freedom of choice in marriage or in the presence of an alien spouse in the United States. In overriding the doctrine of consular nonreviewability, the panel majority improperly encroached on Congress’s plenary authority to determine the conditions for the admission of aliens into the United States. That error constitutes a significant violation of the separation of powers and is serious enough to merit *en banc* reconsideration.

2. The panel majority’s application of limited judicial review was equally flawed. The panel majority held that, to provide a “facially legitimate” reason for a visa denial, the government must identify a statutory “ground narrow enough to allow [the court] to determine that it has been ‘properly construed.’” *Din*, 718 F.3d at 862. The government also must allege facts sufficient for the court to determine whether they “constitute a ground for exclusion under the statute.” *Id.* at 863. In so holding, the panel majority overstepped the role assigned to the courts

in immigration and national security matters. *See Mezei*, 345 U.S. at 212 (“[B]ecause the action of the executive officer under such authority is final and conclusive, the [Executive Branch] cannot be compelled to disclose the evidence underlying [its] determinations in an exclusion case.”).

The Supreme Court has recognized that the Constitution assigns to the political branches the authority for protecting the national security, thus requiring judicial deference to Congress and the Executive’s national security judgments. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting the “heightened deference to the judgments of the political branches with respect to matters of national security”); *Department of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.”). The Supreme Court also has recognized a direct connection between Congress’s plenary authority over the admission of aliens and its authority over national security. *See Galvan v. Press*, 374 U.S. 522, 530 (1954) (“The power of Congress over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security.”).

Typically, when a consular officer denies a visa application because the officer has determined that the alien is inadmissible on a statutory ground, Congress requires the officer to provide the alien with written notice that “states

the determination” and that “lists the specific provision or provisions of law under which the alien is inadmissible.” 8 U.S.C. § 1182(b)(1). Congress has, however, made the notice requirement inapplicable to visa denials made on terrorism-related grounds. 8 U.S.C. § 1182(b)(3). Although neither the statute nor the legislative history explain why Congress enacted that notice exception, that exception unambiguously furthers the ability of the Executive Branch to protect the national security and to conduct terrorism-related investigations by avoiding the disclosure of potentially sensitive information when denying a visa to an alien who a consular officer has determined is inadmissible, based on terrorism-related grounds.

In addition, information supporting a visa denial pursuant to 8 U.S.C. § 1182(a)(3)(B) often is classified, would jeopardize public safety if revealed, is permitted for only limited use by another agency, or is related to an ongoing investigation. Providing such information to an individual visa applicant, even if possible to do so in an unclassified form, may reveal details about national security investigations and operations. For that reason, if courts were to require the Department of State to identify factual allegations supporting a consular officer’s visa denial on national security grounds, other agencies would be less willing to share intelligence or other sensitive information with consular officers, making it more difficult for such officers to exclude aliens who could be threats to the national security. It is for such reasons that Congress has given consular officers



discretion whether to even notify an alien the statutory ground for a decision that is based on terrorism-related grounds. 8 U.S.C. §1182(b)(3).<sup>2</sup>

The panel majority noted that the Government could, “if necessary,” provide the information in question to a court *ex parte in camera*, *Din*, 718 F.3d at 866, or it could assert the state secrets privilege to avoid disclosure of classified information. *Din*, 718 F.3d at 866. But these proposed solutions do not adequately safeguard the political branches’ role in making visa decisions implicating national security. Consular officers *in this case* decided that they could inform the alien for whom a visa was sought that his visa was denied on terrorism-related grounds. But in other cases, consular officers may decide not to inform the alien had been refused a visa on terrorism-related grounds. *See* 8 U.S.C. § 1182(b)(3). Requiring *in camera* disclosure of information would make it more likely that the alien would be able to determine that a refusal was based on terrorism-related grounds, notwithstanding the political branches’ determination that it would better protect

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<sup>2</sup> The panel majority separately held *Din* has standing to challenge the constitutionality of the notice exception, although it did not pass on the merits of *Din*’s constitutional challenge to that provision. *Din*, 718 F.3d at 867-68. However, because the denial of Berashk’s visa does not implicate any of *Din*’s constitutionally-protected interests, *see* pp. 6-9, *supra*, the statutory exception does not “inva[de] a legally protected interest,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and *Din* thus cannot establish injury in fact. Accordingly, she lacks standing to challenge the constitutionality of the exception. Should the Court grant *en banc* rehearing of this matter and hold either that the visa denial is not subject to judicial review or that the Department of State’s identification of 8 U.S.C. § 1182(a)(3)(B) was a facially legitimate reason for the denial, it may, in the interest of judicial economy, also wish to address *Din*’s standing to challenge the constitutionality of the notice exception.

the national security to withhold that information. For similar reasons, requiring the Executive Branch to invoke the state secrets privilege to prevent disclosure of classified information would provide an alien with more information than the Executive deemed prudent in cases in which it determined not to notify the alien that it had refused the visa application based on an alien's links to terrorism..

Thus, the panel majority's requirement that the government identify a specific statutory ground of inadmissibility and make specific factual allegations coming within that ground gives insufficient deference to the political branch's principal role in matters involving both national security and the admission of aliens. Because Congress has given consular officers discretion to decide how much information to provide when denying visas on terrorism-related grounds, a consular officer's general explanation that a visa was denied on terrorism-related grounds qualifies, at least in this context, as a "facially legitimate" reason, in light of the Constitution's assignment of national security authority to the political branches. *See Zadvydas*, 533 U.S. at 696. Even assuming the panel majority correctly determined that the denial of Berashk's visa implicated Din's constitutionally protected interest, *en banc* review is merited to rectify the panel majority's determination that the State Department's identification of the statutory ground for inadmissibility for terrorism-related grounds is not a "facially legitimate" reason for a visa denial.

## CONCLUSION

For the reasons discussed above, the Court should grant *en banc* rehearing.

Dated: September 9, 2013

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE  
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1**

I certify that, in compliance with Circuit Rules 35-4 and 40-1, the attached PETITION FOR REHEARING EN BANC is proportionately spaced, has a typeface of 14 point Times New Roman font, and contains 3,467 words.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on September 9, 2013, I electronically filed the foregoing PETITION FOR REHEARING EN BANC through the CM/ECF system for the United States Court of Appeals for the Ninth Circuit. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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